

2014 WL 6696369 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

Harold W. BADDERS, Jr., Petitioner,
v.
Penny Badders ROGERS, Respondent.

No. 9639-ML.
November 21, 2014.

Petitioner's Response in Opposition to Respondent's Motion to Stay Discovery

Ferry Joseph, P.A., [David J. Ferry, Jr.](#) (#2149), [Regina M. Matozzo](#) (#5510), 824 N. Market Street, Suite 1000, P.O. Box 1351, Wilmington, DE 19899, 302-575-1555, for petitioner.

Petitioner, Harold W. Badders, Jr., ("Petitioner") by and through his undersigned counsel, hereby submits the following Response in Opposition to Respondent's Motion to Stay Discovery and in support thereof states as follows:

1. Petitioner is an **elderly** man who granted his daughter, Respondent, Penny Badders Rogers, authority under a durable power of attorney. Respondent breached her fiduciary duty to Petitioner while acting as his agent under a power of attorney by mismanaging his funds, misappropriating funds for her own use, and by taking out a line of credit in Petitioner's name without his authorization.
2. Petitioner initiated this claim under the Delaware Durable Personal Power of Attorney Act (the "Act"). Petitioner's request for relief includes, 1) a determination that the Respondent violated the Act by breaching her fiduciary duty to the Petitioner and by refusing to provide an accounting; 2) an accounting of all funds expended from Petitioner's assets; 3) a determination that the line of credit taken out against Mr. Badders' home was obtained by Respondent without Petitioner's authorization; and 4) the return of all funds taken from Mr. Badders assets including the immediate repayment of the line of credit.
3. The parties engaged in discovery pursuant to the Stipulated Scheduling Order granted by the Court on August 22, 2014. The parties agreed to, among other deadlines, a fact discovery deadline of November 30, 2014.
4. Petitioner's Second Set of Interrogatories and Requests for Production of Documents Directed to Respondent were served upon Respondent's counsel on October 28, 2014.
5. On October 30, 2014, Petitioner's counsel requested a customary extension of the fact discovery deadline. Petitioner informed Respondent of his intention to depose PNC Bank employees and Respondent's husband and to obtain additional records. Respondent's counsel stated his intention to file a motion for summary judgment and his position that discovery should be stayed until resolution of his motion. With a looming discovery deadline and bound by the Stipulated Scheduling Order, Petitioner could not agree to stay discovery. *See* Exhibit "A" to Respondent's Motion to Stay Discovery. ¹
6. On November 3, 2014, Petitioner noticed the records deposition of the records custodian of PNC Bank for November 20, 2014.
7. After Petitioner's request for a discovery extension was rejected by Respondent's counsel, Petitioner filed a Motion to Modify Stipulated Scheduling Order on November 7, 2014. As set forth more fully in Petitioner's motion, Petitioner seeks to extend the fact discovery deadline from November 30, 2014, until January 15, 2015. The requested extension will have no impact on the trial date scheduled for May 12-13, 2015. To date, Respondent has not filed a response to the Petitioner's Motion.

8. The deposition of the Respondent's husband, William Rogers, has been noticed for November 25, 2014.² After learning that Mr. Rogers has benefited from the use of Petitioner's funds, his deposition testimony is necessary to determine whether he should be named as an additional Defendant.³

9. The deposition of Petitioner's caregiver, Eiler Hillard has been noticed for November 25, 2014. Ms. Hilliard witnessed Respondent's attempts to conceal her misuse of Petitioner's funds by ensuring that Petitioner did not receive his bank statements and credit card statements.

10. Petitioner is also seeking information regarding a two-year criminal investigation of the **financial exploitation** of Petitioner by Respondent conducted by the Delaware Department of Justice.

Argument

11. The customary procedure is to permit discovery to proceed despite the pendency of a possibly dispositive motion and a stay of discovery is rarely granted. *Darneille v. Santa Fe Industries, Inc.*, 1979 WL 5968, at *2 (Del.Ch. 1979) (citing *Carl Cobin, Inc. v. Excelsior, Inc.*, Del.Ch., C.A.No. 5697 (January 22, 1979)).

12. While the Court has discretion to grant a stay of discovery, discovery will not be stayed unless the party requesting the relief demonstrates “extraordinary circumstances” “showing hardship attributable to discovery.” *Darneille, supra*, at *3. 13. Respondent failed to meet her burden to demonstrate “extraordinary circumstances” that warrant a stay of discovery and Petitioner cannot adequately respond to the Petitioner's Motion for Summary Judgment without the opportunity to develop a complete factual record.

14. Respondent argues that discovery should be stayed because “there is a substantial likelihood that the discovery sought by Badders will be unnecessary” claiming that Petitioner's action is barred by the three year statute of limitations period pursuant to 10 Del.C. § 8106. See Exhibit “A”. Respondent's argument fails for several reasons.

15. Respondent's position fails to acknowledge the relief requested by the Court. Petitioner is seeking relief for a breach of fiduciary duty and failure to provide an accounting under the Durable Personal Power of Attorney Act which does not provide an applicable statute of limitations. See *IMO The Estate of Paulina DuPont Dean*, 2014 WL 3221222, at *5 (Del. Ch.) (ordering a fiduciary under a durable power of attorney to submit to a third party forensic accounting of funds expended from his mother's account from 2004 to the present(June 30, 2014)).

16. Respondent's position also fails to take into account the well-settled law governing the application of statutes of limitation in a court of equity. A statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches. *Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 1594085, at *12 (Del.Ch.). When considering the defense of laches, the court has held,

A court of equity moves upon considerations of conscience, good faith and reasonable diligence. Knowledge and unreasonable delay are essential elements of the defense of laches. The precise time that may elapse between the act complained of as wrongful and the bringing of suit to prevent or correct the wrong does not, in itself, determine the question of laches. What constitutes unreasonable delay is a question of fact dependent largely upon the particular circumstances. *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 8-9 (Del. 2009)(citing *Fed. United Corp. v. Havender*, 11 A.2d 331, 343 (Del. 1940).

17. Respondent's position ignores the fact that a full factual record has not yet been developed, namely on the issue of “unreasonable delay”. Respondent states that “the parties have already developed a record on that issue in their written discovery,

document production, and depositions.” Petitioner disagrees. The defense of laches is a question of fact and Petitioner's premature motion for summary judgment will deprive Petitioner of the opportunity to adequately respond to the motion. Likewise, Respondent's reliance on *Caravias v. Interpath Communications, Inc.* is misplaced. While the Court stayed merits discovery in that case, it also ordered the parties to develop a full factual record on the issue of laches pending summary judgment consideration. [2008 WL 2268355](#), at *5 (Del. Ch.).

18. Respondent's position that the benefit of additional discovery is outweighed by the costs to the parties is unconvincing. The additional discovery enumerated in this response is minimal (two depositions and additional records requests) when weighed against the benefit of being able to submit briefs based on a full factual record. See *Darneille*, *supra*, at *3 (“Discovery is often an expensive and burdensome process to which litigants must normally submit themselves.”).

19. The parties will be unnecessarily burdened though time, expense and efficiency by briefing a premature motion for summary judgment and response when the full factual record has not been developed. Furthermore, Respondent is not likely to prevail on its premature motion and the parties will have to complete discovery after full briefing and a decision by the Court.

20. Granting a stay at this point will make it much more likely that the trial date would be postponed. Completion of discovery would happen after the motion for summary judgment is denied and after exceptions have been taken. Petitioner does not want to put the Court into a position of having to expedite its review of the summary judgment motion to preserve the current trial date. Completing discovery concurrently with the briefing of the summary judgment motion will lessen the burden on the Court.

WHEREFORE, Petitioner respectfully requests this Honorable Court deny Respondent's Motion to Stay Discovery, grant Petitioner's Motion to Modify Scheduling Order and allow the parties to brief Respondent's summary judgment motion after obtaining a complete factual record.

Dated: November 21, 2014

FERRY JOSEPH, P.A.

/s/ Regina M. Matozzo

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Footnotes

¹ Respondent's Motion to Stay Discovery is attached hereto as Exhibit “A”.

² Respondent believes any discovery is automatically stayed by the filing of his Motion for Protective Order pursuant to [Chancery Court Rule 26](#). Petitioner disagrees with Respondent's interpretation of [Chancery Court Rule 26](#) and the parties are still bound by

the Stipulated Scheduling Order and should proceed with discovery concurrently with responding to the pending motions. *See* email correspondence attached as Exhibit “B”

- 3 *See Schock v. Nash*, 732 A.2d 217, 234 (Del. 1999) (Ordering restitution against the family members of an attorney-in-fact who benefitted from unauthorized transfers made pursuant to a durable power of attorney).

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